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Supreme Court of the United States.

OCTOBER TERM, 1966.

No. 425.

BERNARD BANE,
Petitioner,

v.

SUPERINTENDENT OF BOSTON STATE HOSPITAL,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Opinions Below.

The opinion of the Supreme Judicial Court of Massachusetts (App. *infra*, p. 13) is reported at Massachusetts Advance Sheets (1966), p. 693.

Jurisdiction.

The petitioner invokes the jurisdiction of this Court under 28 U.S. Code, § 1257 (3).

Questions Presented.

1. Does the United States Supreme Court have jurisdiction of a case in which the petitioner has not expressly

raised a federal question in the Court of the first instance, nor has the highest Court of the State passed upon this issue in its disposition of the case, but where the petitioner raises this point for the first time in his petition for a writ of certiorari?

2. Is any portion of Mass. G.L. c. 111, § 70, unconstitutional as denying petitioner the equal protection of the laws under the Fourteenth Amendment?

Constitutional Provisions and Statutes Involved.

1. Constitution of the United States, Amendment XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. 28 United States Code, Section 1257 (3).

Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under.

the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. (June 25, 1948, ch. 646, 62 Stat. 929.)"

3. Massachusetts General Laws, Chapter 111, Section 70.

"Hospitals, dispensaries or clinics, and sanatoria licensed by the department of public health or supported in whole or in part by the commonwealth shall keep records of the treatment of the cases under their care and the medical history of the same. Such records may be made in handwriting, or in print, or by typewriting, or by the photographic or microphotographic process, or any combination of the same. Whenever pre-existing records shall have been photographed or microphotographed and the photographs or microphotographs shall have been duly indexed and filed, such hospital, dispensary or clinic, or sanatorium, upon notifying in writing the supervisor of public records referred to in chapter sixty-six, may destroy the original records so photographed or microphotographed, and such photographs or microphotographs shall have the same force or effect as the original records from which they were made. Such records shall be in the custody of such hospital, dispensary or clinic, or sanatorium. Section ten of chapter sixty-six shall not apply to such records; provided that such records and similar records kept by such hospital, dispensary or clinic, or sanatorium, except a hospital or clinic under the control of the department of mental health, may be inspected by the patient to whom they relate or by his attorney upon delivery of a written authorization from the said patient, and a copy shall be furnished upon his request and a payment of a reasonable fee; and provided, further, that upon proper judicial or-

der, whether in connection with pending judicial proceedings or otherwise, or, except in the case of records of hospitals under the control of the department of mental health, upon order of the head of the state department which issues the license or of the head of the state department having jurisdiction or control of such hospital, dispensary or clinic, or sanatorium and in compliance with the terms of said order, such records may be inspected and copies furnished on payment of a reasonable fee. Any such record or any part or portion thereof may be destroyed fifty-five years after the discharge or the final treatment therein of the patient to whom it relates." (As amended by St. 1963, c. 23; St. 1964, c. 653.)

Statement of the Case.

It is agreed on behalf of the respondent that the Statement of the Case as it appears in the Petition for Writ of Certiorari of the petitioner at page 4 is correct and applicable to this brief for respondent as well.

Argument.

1. The Supreme Court of the United States does not have jurisdiction to hear a case in which the alleged federal issue involved was not raised or decided in the State Court.

The petitioner invokes the jurisdiction of the Supreme Court to hear this case under 28 U.S. Code, § 1257 (3). However, it is well settled that, where the State Supreme Court did not pass on the question now urged, and where it does not appear to have been properly presented to that Court for decision, the Supreme Court is without juris-

diction to consider it in the first instance. *Congress of Industrial Organizations* v. *McAdory,* 325 U.S. 472, 477 (1945). See also *Shelley* v. *Kraemer,* 334 U.S. 1, 8-9 (1948); *Walters* v. *City of St. Louis,* 347 U.S. 231, 233 (1954); *Michel* v. *Louisiana,* 350 U.S. 91, 101 (1955); *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U.S. 430, 433 (1940); and *Wilson* v. *Cook,* 327 U.S. 474, 482 (1946).

The petitioner has never, by his own admission, expressly invoked federal protection in the Courts below (Petition, pp. 2, 5). Therefore the United States Supreme Court has no jurisdiction to consider the case.

The petitioner alleges that a federal question was raised before the Supreme Judicial Court of Massachusetts by the respondent in his brief. The specific portion relied on by petitioner is as follows:

> "The statute involved does not deprive the petitioner of any right guaranteed under the Constitution of the Commonwealth or the United States of America. To invoke Constitutional principles some right of the petitioner relating to life, liberty or property must have been taken away; injured or threatened."

Numerous cases indicate that this allegation is without merit. See *Ellis* v. *Dixon,* 349 U.S. 458 (1955) and *Herndon* v. *Georgia,* 295 U.S. 441 (1935).

In *Ellis* v. *Dixon, supra,* the petitioners had expressly raised a constitutional issue before the New York Court of Appeals. However, they failed to specify the facts necessary to show discrimination. The Court held that what was alleged was entirely too amorphous to permit adjudication of the constitutional issues asserted; further, that,

because the pleadings were insufficient in this respect, the Court did not have jurisdiction to hear the case, since the New York Court of Appeals might have based its dismissal on an adequate non-federal ground. *Id.* 462.

In the case of *Herndon* v. *Georgia, supra,* the petitioner was convicted of attempting to incite insurrection in violation of a state statute. There was a preliminary attack upon the indictment in the trial court on the ground, among others, that the statute was in violation of the Constitution of the United States. This contention was overruled. No exception was taken to this ruling, nor was it assigned as error in the bill of exceptions as the rules of the state practice required. In this situation, the State Supreme Court declined to review the rulings. The Court, in holding that it was without jurisdiction to hear the case, stated at page 442:

> "We find it unnecessary to review the points made, since this court is without jurisdiction for the reason that no federal question was seasonably raised in the court below or passed upon by that court."

The *Ellis* and *Herndon* cases tend to discredit petitioner's reliance on a single phrase in his adversary's brief as a sufficient basis for the proper presentation to a Court of a constitutional issue.

The four cases relied on by petitioner to support his jurisdictional argument (Petition, pp. 6, 7) are clearly distinguishable and do not apply to the facts of the instant case.

In *Lovell* v. *Griffin,* 303 U.S. 444, 448 (1938), the appellant, with permission of the Court, moved to dismiss the charge on the ground, among others, that the ordinance in question violated the Fourteenth Amendment in abridg-

ing "the freedom of the press" and prohibiting "the free exercise of petitioner's religion." The Georgia Court of Appeals overruled these objections and sustained the constitutional validity of the ordinance. The Court found that the appellant's constitutional objection was sufficiently specific and was definitely ruled upon. At page 450 the Court states:

> "We think that this question was adequately presented and was decided in the instant case. Whether it was so presented and was decided is itself a federal question."

The petitioner undoubtedly relies on the above statement to support his allegation. However, in the *Lovell* case there was a substantial and adequate evidentiary basis for the Court's finding that the constitutional issue was properly raised below, on both the trial and the appellate levels. In the instant case there is not a shred of evidence, other than the statement in Respondent's Brief, that any federal issue was being considered either explicitly or implicitly by the Court.

In the case of *United Brotherhood of Carpenters & Joiners of America* v. *United States,* 330 U.S. 395 (1947), the Court states at page 412:

> "We have the power to notice a 'plain error' though it is not assigned or specified."

The petitioner has attempted to substantiate his allegations with this statement. However, in this case lack of jurisdiction was not an issue. The Court asserted its power to reverse because of the failure of the trial judge to charge the jury correctly, even if no objection was then made to the charge. Thus the Court reiterated its

own power, as a reviewing tribunal, to notice glaring errors not pointed out by the parties. This power has never been questioned. However, such notice can be taken only when the case is already properly before the Court. It cannot operate to confer jurisdiction on the Court where the federal issue involved was not adequately raised below.

In any event, the petitioner has not established that the Massachusetts Supreme Judicial Court has committed "plain error." The Court has the power to notice plain error, but it only exercises this power in "clear cases" and in "exceptional circumstances." *Kessler* v. *Strecker*, 307 U.S. 22, 34 (1939). In the instant case there is nothing in the record which demonstrates either a "clear case" or "exceptional circumstances."

In *Williams* v. *Kaiser*, 323 U.S. 471 (1945), the petitioner, who was denied the right to counsel, raised his constitutional objections in a petition for writ of habeas corpus to the Supreme Court of Missouri. The petition was denied for the reason that it failed to state a cause of action. The Court held that the question whether petitioner's federal rights had been infringed was still open for decision, since "the action of the state court was on the ground that its statute requiring the appointment of counsel was not violated." *Id.*, at 473. The Court did not say, as petitioner in the instant case claims it did, "that it will be presumed that State Court based its decision on federal grounds" (see Petition, p. 6). In the *Williams* case the constitutional question was properly raised below but was not decided by the State Court, so the Supreme Court had jurisdiction. In the present case the petitioner seeks to raise a federal question for the first time merely on the basis of an untenable presumption that the decision of the Massachusetts Supreme Judicial Court is based on federal grounds. Even if it can be assumed that in the *Williams* case the State Court did implicitly rest its deci-

sion on federal grounds, that implication can be supported only by the fact that the constitutional question involved was properly before it. Such was not the case in the situation at hand.

Similarly, *Ward* v. *Board of County Commissioners of Love County, Oklahoma,* 253 U.S. 17 (1920), has no applicability to the instant case. In *Ward* the Court found that the petitioner's federal right "was specially set up and claimed as such in the petition." *Id.,* at 22. Under these circumstances the Supreme Court does indeed have the power to decide whether the federal question involved was given due recognition by a State Court or was merely avoided by basing its decision on an untenable non-federal ground. *Ibid.* In the present case the petitioner has never, by his own admission, expressly invoked federal protection in the Courts below (Petition, pp. 2, 5). There was manifestly no duty on the part of the Massachusetts Supreme Judicial Court to pass upon an issue not before it, hence, there can be no presumption that the Court avoided a federal question.

It is thus clear that the petitioner has based his jurisdictional argument on a few slender reeds that cannot validly support his contention, especially when juxtaposed against the vast array of authority to the contrary.

2. Massachusetts G.L. c. 111, § 70, is constitutional and does not deny the petitioner equal protection of the laws.

Assuming *arguendo* that the Supreme Court does have jurisdiction, petitioner's substantive argument has no merit. It is clear that Massachusetts G.L. c. 111, § 70, does not deny citizens in petitioner's position the equal protection of the laws.

The problem of legislative classification is a perennial one, admitting of doctrinaire definition. The prohibition of the equal-protection clause goes no further than the

invidious discrimination. Williamson v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955).

In *McGowan* v. *Maryland*, 366 U.S. 420 (1961), the Court made it very clear that a statute resulting in some inequality is not necessarily unconstitutional. At pages 425-426 the Court states:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside *if any state of facts reasonably may be conceived to justify it.*" (Emphasis supplied.)

Similarly, in the case of *Kotch* v. *Board of River Port Pilot Commissioners of New Orleans*, 330 U.S. 552, 556 (1947), the Court said:

> "A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. [Citation omitted.] Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be. For it is axiomatic that the consequence of regulating by setting apart a classified group is that those in it will be subject to some restrictions or receive certain advantages that do not apply to other groups or to all the public."

See also, to the same effect: *Tigner* v. *Texas,* 310 U.S. 141, 147 (1940); *Goesaert* v. *Cleary,* 335 U.S. 464, 466-467 (1948); *Griffin* v. *Illinois,* 351 U.S. 12, 21 (1956); and *Morey* v. *Doud,* 354 U.S. 457, 465-466 (1957).

The reason why patients who have been confined in mental hospitals or clinics are not permitted access to their records is to insure the continued mental health and stability of those patients. The records concerning mental patients, if they are to meet the needs of the mental hospital and the patient, must contain material that should be kept confidential. For example, the history will contain statements made by a wife or husband concerning various oddities or peculiarities, whether sexual or otherwise, of a patient. It will contain material concerning hallucinations and delusions. Such material read by the patient would be completely anti-therapeutic and might do much harm.

The statute involved is designed to protect a patient who has been confined in a mental hospital. Therefore it is clearly a valid exercise of legislative power to make an exception of mental patients with regard to inspection of hospital records. Such a classification is manifestly reasonable and rational, and is therefore not repugnant in the least to the Fourteenth Amendment. Even if the Legislature's apprehensions might not apply to a few isolated cases, the law must of necessity make general classifications, and the Legislature is certainly within permissible bounds in feeling that the balance of interests requires a complete denial of access to all records of mental hospitals and clinics.

The conclusion is thus inescapable that the petitioner has not been denied the equal protection of the laws under the Fourteenth Amendment.

Conclusion.

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix.

BERNARD BANE *vs.* SUPERINTENDENT OF BOSTON STATE HOSPITAL.

[Massachusetts Advance Sheets, Pages 693-694.]

WILKINS, C.J. The prayer in this petition for a writ of mandamus is that the respondent superintendent of the Boston State Hospital be commanded to permit the petitioner to examine, and to obtain copies of, the records of the petitioner's involuntary "admission and detention" at that hospital in 1963. The petitioner appealed from a denial of the petition.

The Boston State Hospital is under the control of the Department of Mental Health. G.L. c. 19, § 5. Its records are subject to G.L. c. 111, § 70. The petitioner relies upon § 70, as amended by St. 1945, c. 291. That statute in its present form, however, is as amended through St. 1964, c. 653, which contains an exception expressly excluding from inspection by a patient or his attorney the records of "a hospital or clinic under the control of the department of mental health."

The petitioner contends that St. 1964, c. 653, was enacted in violation of Senate Rule 50,[1] but the violation is not conceded. In any event, the statute cannot be thus impugned in a court of law. *Field* v. *Clark*, 143 U. S. 649, 672. *Sears* v. *Treasurer & Recr. Gen.* 327 Mass. 310, 321. *Weeks* v. *Smith*, 81 Maine, 538, 547. 81 C. J. S., States, § 39.

There has been no violation of art. 5 of the Declaration of Rights of the Constitution of the Commonwealth.

Order denying petition affirmed.

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[1] "No motion or proposition of a subject different from that under consideration shall be admitted under the color of an amendment."